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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 861

JEFFERSON LAKE SULPHUR COMPANY,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	PAGE
MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM SUMMARILY	1
COUNTER-STATEMENT OF QUESTION INVOLVED	2
COUNTER-STATEMENT OF THE CASE	2
POINT I—The judgment below was based solely on the State Court's construction of the New Jersey Corporation Law as it applied to appellant, a New Jersey corporation, and does not present a federal question	5
CONCLUSION	10

Cases Cited

Buchanan v. Warley, 245 U. S. 60 (1917)	6, 7
Hughes v. Superior Court, 339 U. S. 460 (1950)	9
Martindell v. Fiduciary Counsel, Inc., 133 N. J. Eq. 408, 30 A. 2d 281 (E. & A., 1942)	6, 8
Randolph Wurlitzer Co. v. Commissioner of Int. Rev., 81 F. 2d 971 (C. A. 6th, 1936), cert. denied, 298 U. S. 676 (1936)	8
Standard Oil Co. v. New Jersey, 341 U. S. 428 (1951)	6-9
State v. American Sugar Refining Co., 20 N. J. 286, 119 A. 2d 767 (1936)	6
State v. Sperry & Hutchinson Co., 23 N. J. 38, 127 A. 2d 169 (1956)	6
Western Union Telegraph Co. v. Pennsylvania, 368 U. S. 71 (1961)	6, 7

PAGE

Statutes Cited

Corporation Law of New Jersey 5
General Corporation Laws of New Jersey 3
N.J.R.S. 14:11-1 2
N.J.R.S. 14:11-2 2
N.J.S. 2A:37-29 (Custodial Escheat Law of New Jersey) 2-4, 9, 10
L. 1951, Ch. 304 3
N.J.S.A. 2A:37-29 9
N.J.S.A. 2A:37-30 9
N.J.S.A. 2A:37-32 9
N.J.S.A. 2A:37-34 9
N.J.S.A. 2A:37-40 10
28 U.S.C. 1257 (2) 5, 6

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On Appeal from the Supreme Court of New Jersey

Motion to Dismiss or in the Alternative to Affirm Summarily

The State of New Jersey moves to dismiss this appeal on the grounds that (a) this appeal does not present a substantial federal question and (b) the judgment of the Superior Court, as affirmed by the Supreme Court of New Jersey, rests on an adequate non-federal basis. In the alternative, the State moves to affirm the judgment below summarily, on the ground that said judgment is so clearly correct on the merits that no further argument is required.

Counter-Statement of Question Involved

Is there a substantial federal question raised by a judgment of the New Jersey Supreme Court which holds, on State grounds, that an amendment to a certificate of incorporation of a New Jersey corporation is invalid because:

(a) Notice to the stockholders of the proposed amendment was improper; and

(b) Contrary to New Jersey public policy and without statutory authority, the amendment sought to convert to corporate property dividends set aside for payment to stockholders, if the dividends remain unclaimed for three years, so as to defeat New Jersey's program of taking custody of such property for the benefit of the owner after it remains unclaimed for five years.

Counter-Statement of the Case

This is an appeal from a judgment of the Supreme Court of New Jersey which affirmed a trial court judgment directing that certain unclaimed dividends held by the appellant, totalling $5,657.46, be delivered to the State Treasurer of New Jersey for custodial safekeeping under the provisions of the Custodial Escheat Law of New Jersey, N.J.S. 2A:37-29 *et seq.* The appellant, a New Jersey corporation, had set aside the dividends for payment to its stockholders and held same in a separate bank account.

Appellant admitted in the pretrial order that the $697.33 of the unclaimed dividends involved were payable to the State but resisted the State's right to take custody of the other dividends involved, claiming that it had amended its corporate charter under Sections 14:11-1 and 14:11-2 of the Revised Statutes of New Jersey and thereby cut off the rights of its stockholders to dividends which were unclaimed for more than 3 years.

Appellant Jefferson Lake Sulphur Company (hereinafter referred to as, "Jefferson"), was organized under the General Corporation Laws of New Jersey on March 30, 1949. On December 30, 1949, Jefferson Lake Sulphur Co., Inc., a Louisiana corporation (hereinafter referred to as the Louisiana corporation), was merged into Jefferson by agreement of merger duly approved and filed. Jefferson, the New Jersey corporation, survived. The merger agreement provided, among other things, that the debts, liabilities and duties of the Louisiana corporation shall attach to the surviving corporation and may be enforced against it to the same extent as if incurred or contracted by said surviving corporation.

On July 13, 1951, New Jersey enacted the Custodial Escheat Law, Chapter 304, Laws of 1951, now contained in N.J.S.A. 2A:37-29 *et seq.* This law provides, *inter alia*, that dividends payable by a New Jersey corporation to any person who has remained unknown for five successive years, or whose whereabouts have remained unknown for five successive years, or which dividends have remained unclaimed for five successive years, shall, at the direction of the Superior Court in a summary action, be delivered to the State Treasurer for safekeeping.

About four months after the enactment of the Custodial Escheat statute, appellant sent notice of a special meeting to its stockholders at their last known address as shown on the corporation's books. This special meeting was called to consider proposed amendments to the certificate of incorporation, among which were the following:

(a) To provide that all dividends on the company stock unclaimed for three years after the date payable shall revert in full ownership to the company;

(b) To provide that stock of this company, issued or issuable as a stock dividend or pursuant to a stock split-up

or any other recapitalization or reorganization plan, shall be issued or transferred in full ownership to the company if unclaimed for three years following the date on which issuable; and,

(c) To provide that the board of directors may, in its discretion, authorize payment or issuance, after the dates indicated, to the persons theretofore entitled thereto, of sums and securities reverting to the company under (a) and (b) above.

The notice contained an explanatory note that the amendments were prompted by the recently adopted New Jersey Escheat Law.

On December 12, 1951, the date of the special meeting, defendant had issued and outstanding 349,227 shares of common stock and 97,502 shares of preferred stock. At the special meeting slightly more than two-thirds of the stockholder votes were cast in favor of the amendment. A substantial number of stockholders did not assent, and others opposed the amendment. As noted by the New Jersey Supreme Court, the inference is inescapable that certain shares of unconverted stock of the Louisiana corporation which had been merged into appellant were not voted on the amendment.

On June 6, 1958, New Jersey commenced this action against appellant under the Custodial Escheat Law, N.J.S. 2A:37-29 *et seq.* to obtain custody of the unclaimed dividends here involved. The trial court held that appellant, a New Jersey corporation, was not authorized to amend its charter in the foregoing manner and that the amendments were contrary to the public policy of New Jersey. Judgment was entered in favor of the State of New Jersey for the dividends involved.

Jefferson appealed from this judgment to the Appellate Division of the Superior Court. The Supreme Court of New Jersey certified the appeal on its own motion and affirmed the judgment of the Superior Court. The opinion of the Supreme Court of New Jersey is set out in appellant's Jurisdictional Statement, page 7, *et seq.* Jefferson now seeks to appeal to this Court under 28 U.S.C. 1257 (2).

POINT I

The judgment below was based solely on the State Court's construction of the New Jersey Corporation Law as it applied to appellant, a New Jersey corporation, and does not present a federal question.

The decision below was based on the two following grounds, either one of which, resting purely on State law, would independently support the judgment:

(1) Notice of the proposed amendment given to the stockholders did not adequately discharge the fiduciary obligations of the corporation to fully and fairly disclose all the relevant facts upon which the stockholders' decision for or against the amendment should be formulated; and

(2) The adoption of the amendment by the appellant was contrary to the public policy of the State of New Jersey and was invalid.

Appellant's appeal is directed only to ground (2) above. No claim is made that ground (1) violates appellant's federal constitutional rights. Therefore, the judgment below rests upon one ground, improper notice to stockholders of a proposed amendment, which appellant does not complain of on this appeal and which is sufficient to sustain the State Court decision. Therefore, the appeal should be dismissed on this basis alone.

Appellant complains that ground (2) upon which the State Court relied violates appellant's federal constitutional rights. But if under state law appellant is not authorized to amend its charter to restrict stockholders' rights to dividends in the proposed manner, appellant could not acquire for itself a property right in the unclaimed dividends, and has no right that can be violated. Under New Jersey law the dividends remain the property of the stockholders to whom they are payable. Opinion below, Jurisdictional Statement, p. 15; *Martindell* v. *Fiduciary Counsel, Inc.*, 133 N. J. Eq. 408, 411, 30 A. 2d 281, 285 (E. & A. 1942). Except for the naked right to custody, appellant does not have any legal or moral claim to the dividends. Opinion of court below, Appellant's Jurisdictional Statement, page 16; *State* v. *Sperry & Hutchinson Co.*, 23 N. J. 38, 44, 127 A. 2d 169, 172 (1956); *State* v. *American Sugar Refining Co.*, 20 N. J. 286, 297, 119 A. 2d 767, 773 (1956). Therefore, the claim by appellant that it has been deprived of a right to freely dispose of its property is illusory and without merit.

In the trial court and in its brief on the appeal, appellant argued that it acquired rights to the dividends by reason of a contractual relationship with its stockholders. However, at the oral argument on the appeal below, under questioning by members of the court, counsel for appellant expressly withdrew the contention that the judgment of the trial court impaired its constitutional right to contract. This is indicated by the footnote on page 4 of appellant's Jurisdictional Statement.

Appellant contends that this Court has jurisdiction of this appeal under 28 U.S.C. 1257 (2), citing *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U. S. 71 (1961), *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428 (1951) and *Buchanan* v. *Warley*, 245 U. S. 60 (1917). None of these cases are applicable to the facts presented by the case at bar. The grounds justifying appeals to the United States Supreme Court in said cases are not present in the case at bar.

In *Western Union* this Court noted jurisdiction because the unclaimed property which Pennsylvania sought to escheat was actively claimed by the State of New York. But the case at bar does not present any claim by a state other than New Jersey. Quite the contrary, the record does disclose the stipulation of the parties that Louisiana does not have an applicable escheat or custodial escheat law. No other state having asserted a claim, multi-state escheat claims and federal questions arising therefrom are not issues raised in this case, and this Court should refuse to take jurisdiction. *Western Union Telegraph Co.* v. *Pennsylvania*, *supra*, at 78.

In *Standard Oil* this Court decided that the State of New Jersey had the power to escheat unclaimed dividends on capital stock of a new Jersey corporation notwithstanding the corporation's contention that such action would impair its contractual obligations to its stockholders and otherwise violate due process. That case does not support appellant's contention but, in fact, is authority against appellant's position. No contract question is here involved because, as noted above, appellant expressly withdrew the defense of the constitutional plea of impairment of contract.

In *Buchanan* this Court held invalid a municipal ordinance which imposed racial restrictions on the disposal of real property by an owner. If plaintiff could not sell his land to a colored person because of the prohibition of an ordinance he could not sell his property at all; for this was the only use to which the property could be put. Therefore, the case concerned a restriction which in effect made property inalienable.

In the case at bar, appellant does not have any property right in the unclaimed dividends. That right belongs to the stockholder. As the Court below held, the corporation holds these dividends in trust for the stockholders. (Opin-

ion below, p. 15 of Jurisdictional Statement). *Martindell v. Fiduciary Counsel, Inc.*, *supra*; *State* v. *Standard Oil Co.*, 5 N. J. 281, 302, 74 A. 2d 565, 575 (1950), aff'd, 341 U. S. 428 (1961). It is not a stockholder who is here complaining, but the corporate entity which attempted, in a manner not authorized by law, to convert the unclaimed dividends it holds in a fiduciary capacity to itself as owner. Under New Jersey corporation law Jefferson has no unlimited right to treat the dividends as its own property.

It is clear, therefore, that the case at bar does not present a substantial Federal question either relating to the field of escheat law or to the law dealing generally with alienability of a person's own property. Instead, this case was decided below purely on an interpretation of the state's corporation law—as it relates to notice to stockholders of a proposed charter amendment and as it relates to the power of a corporation to recapture dividends which it holds for the benefit of stockholders.

It is fundamental that the power of a corporation to act rests upon the authority granted to it by the state wherein it was created. As stated in *Rudolph Wurlitzer Co.* v. *Commissioner of Int. Rev.*, 81 F. (2d) 971, 973 (C. A. 6, 1936), cert. denied, 298 U. S. 676 (1936):

> "Not only under state decisions, but also under federal decisions, the sovereignty which determines the existence or non-existence of power in a state corporation is the state. (Citing cases.) A corporation is a mere creature of the law, and possesses only the powers conferred by the statute creating it and those necessarily implied. (Citing cases.) The granting of a corporate right or privilege rests entirely within the discretion of the state, and when granted may be accompanied by such conditions as the Legislature may judge most befitting to its interests and policy."

The due process clause cannot be construed as precluding New Jersey from securing respect from its corporations for its policy of utilizing unclaimed dividends on corporate stock, payable to a stockholder who is unknown or whose whereabouts is unknown, for the benefit of all of its citizens. As expressed by the Supreme Court of New Jersey, this policy does not deprive the appellant of any of its property without due process of law; for, as we have already indicated, appellant held these monies for the benefit of its stockholders and had no legal or moral right to claim the property as its own. *Hughes* v. *Superior Court*, 339 U. S. 460 (1950).

The right of the King, at common law to take possession of abandoned personal property is well known. *Standard Oil Co.* v. *New Jersey*, *supra*, 341 U. S. 435, at footnote 5. As this Court has stated in the foregoing case, the state may use its legislative power to dispose of property within its reach belonging to unknown persons. "Such property thus escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations." 341 U. S. at 436.

The beneficial features of the New Jersey Custodial Escheat Law, as applied to corporate stockholders, are: that dividends are not taken into custody by the State until they remain unclaimed for 5 years (N.J.S.A. 2A:37-29, 30); that notice by mail is then given to the last known address of the stockholder informing him that the State Treasurer holds dividends for his benefit which may be claimed by him (N.J.S.A. 2A:37-32); that if the dividends are not claimed within 2 years after the giving of such notice, the State commences a judicial proceeding to escheat the dividends with publication of notice of such suit and additional notice to the stockholder by mail (N.J.S.A. 2A:37-34); and that the stockholder continues to have a right to claim his dividends within 7 years after judgment of escheat, with inter-

est payable by the State at 2% per annum from the date of judgment (N.J.S.A. 2A:37-40). Thus, the Custodial Escheat Law fulfills the State's public policy not only of using abandoned property for the general good but also, before doing so, of assuring that there is strict compliance with the requirements of giving ample notice to the rightful owner and ample opportunity to such owner to claim the property.

CONCLUSION

For the foregoing reasons, we respectfully urge that the appeal should be dismissed or, in the alternative, that the judgment below be affirmed summarily on the ground that no Federal constitutional right has been violated.

Respectfully submitted,

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